No. 90-52

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALUMINUM COMPANY OF AMERICA,
Petitioner,
v.
JAMES E. ALM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. The first question presented by Alcoa's petition is whether an award of punitive damages imposed by a jury without any meaningful standards comports with the Due Process Clause. Respondent Alm expressly concedes that this same issue is now before this Court in *Pacific Mutual Life Ins. Co.* v. *Haslip*, No. 89-1279. Respondent's Brief ("Resp.Br.") 17 ("This is the only issue under review in *Haslip* which is common to this case."). Alm does not deny that this issue is worthy of the Court's plenary attention. Nor does he deny that this case is in several respects superior to *Pacific Mutual* for addressing that issue.[1]

The only basis respondent offers for this Court to deny certiorari in this case is that this due process issue was supposedly not raised below. Resp.Br. 13, 15, 22. Curiously, respondent fails to couple this assertion with any attempt to refute Alcoa's recitation, already provided in the petition, of the procedural history documenting the manner in which this due process objection to the imposition of punitive damages was properly and timely raised in the Texas Court of Appeals. *See* Pet. 6 n.3. To be sure, respondent argues that Alcoa did not voice this constitutional objection during the formulation of the jury instructions, Resp.Br. 14-15, and respondent might be understood to be arguing thereby that Alcoa's constitutional claim, by analogy to a routine objection that the jury instructions somehow misstated Texas tort law, was waived if not

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[1] Respondent contests only one of the grounds for this superiority set forth in the Petition for Certiorari. *See* Pet. 10. Alm argues that this case is no better than *Pacific Mutual* because Texas law on awards of punitive damages, like the Alabama tort law at issue in *Pacific Mutual*, has changed since the time of trial. Resp.Br. 16-17. Respondent is confused. The new Texas statute imposing a ceiling on punitive damage awards is irrelevant to the issues raised in Alcoa's petition, because Alcoa complains not of the *excessiveness* of the award or of a lack of proportion with respect to the compensatory award (issues that are raised in *Pacific Mutual*), but of the *lack of standards* for affixing punitive liability. In this respect Texas juries have no more guidance now than they did before — only a maximum dollar limit.

made *at trial*. But Alcoa does not allege the kind of "'defect, omission, or fault in pleading'" that the Texas Rules of Civil Procedure address. Resp.Br. 14 (quoting Texas Rules). The objection here is that the lack of standards *anywhere in Texas law* for imposing punitive liability leaves a major structural gap in state law that violates the Federal Constitution — not the sort of defect that a state trial judge can fix by tinkering with a jury charge. Alm points to nothing in Texas law that purports to require that an objection to a constitutionally intolerable lack of standards, for which the legislature is primarily to blame, is waived if not made to a trial judge incapable of curing the problem.

In any event, respondent's unsupported waiver argument has been conclusively trumped by the procedural rulings of the Texas Supreme Court in this case. As we have already pointed out without rebuttal, Pet. 6, the Texas Supreme Court directed the Court of Appeals on remand in 1986 to consider *any* argument Alcoa might choose to raise about punitive damages. In accord with that jurisdictional directive, Alcoa expressly invoked this Court's then-recent dicta about the due process implications of unguided awards of punitive damages in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986), and this Court's notation of probable jurisdiction in *Bankers Life and Casualty Co.* v. *Crenshaw*, 107 S.Ct. 1367 (1987) (No. 85-1765). *See* Pet. 6 n.3. That is more than sufficient to preserve the argument, particularly since the trial of this case occurred in 1981, whereas the first hint of a due process objection to punitive damage awards came half a decade later in *Aetna* in 1986.[2]

[2] Even if Alcoa had failed to raise this new due process argument below, it would still be entitled to invoke it here, for "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise a claim in accordance with the applicable state procedures." *Reed* v. *Ross*, 468 U.S. 1, 16 (1983). *See also Murray* v. *Carrier*, 106 S.Ct. 2639, 2646 (1986). This Court's recently established limits on announcing or retrospectively applying "new rules" on collateral review of criminal convictions that have already become final pose no barrier to the relief Alcoa seeks, since this case is here on direct review. *Cf. Saffle* v. *Parks*, 110 S.Ct. 1257, 1259-60 (1990); *Butler* v. *McKellar*, 110 S.Ct. 1212, 1216 (1990).

Thus, Alm's *only* argument against granting a writ of certiorari on the first question presented in the petition, or at least holding this case pending resolution of *Pacific Mutual*, collapses.[3]

2. Alm's only proffered reason for denying the writ on the second question presented is that "the Texas Supreme Court [has not] made a drastic, sudden, and totally unforeseeable change in state law." Resp.Br. 18. Respondent misses the point. Alcoa's argument is not that the courts of Texas are somehow barred from gradually changing or adapting state tort law, but that the state supreme court may not *affirm a punitive judgment on appeal* by applying a standard or theory of liability different from that on which the case was tried.[4] *That* is the question presented here, although respondent has chosen not to discuss it.

Evidently, Alm has no quarrel either with the due process principles expounded in *Cole* v. *Arkansas*, 333 U.S. 196

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[3] Elsewhere in his brief, Resp.Br. 18 n.37, Alm does contend that the second and third questions presented were not raised in the courts below. In this regard respondent inexplicably takes issue with footnote 3 on page 6 of Alcoa's petition. Respondent is correct that *these* two questions were not raised below, but that is no surprise, since these constitutional violations of Alcoa's rights under *Cole* v. *Arkansas*, 333 U.S. 196 (1948), and under the *ex post facto* principle of the Due Process Clause, *did not even occur until the Texas Supreme Court handed down the decision that Alcoa asks this Court to review*. Respondent again seems confused. The point of footnote 3 of Alcoa's petition was that the *first* question presented, based on other due process principles, was properly raised below — a procedural fact that Alm cannot dispute.

[4] Respondent seems to have confused this issue with the third question presented, since he conflates these distinct due process issues in his brief. *See* Resp.Br. 17 *et seq*. Consequently, all the cases relied upon by Alm in footnote 40, page 21 of his brief are inapposite, since they involved not the question presented here, but the quite different issue of general state power to modify common law defenses and other tort rules. In those of Alm's cases that actually involved a trial on the merits, the standard of defendant's liability applied on appeal was identical to that applied at trial, which distinguishes them from this case. *See In re Asbestos Litigation*, 829 F.2d 1233, 1236, 1244 (3d Cir. 1987); *Karl* v. *Bryant Air Conditioning Co.*, 705 F.2d 164, 165, 166 (6th Cir. 1983).

(1948), and its progeny, or with the application of those principles to this case. *If* a different standard or theory of punitive liability was indeed applied by the Texas Supreme Court on appeal, then respondent apparently concedes the existence of a constitutional issue that warrants the plenary attention of this Court. And, despite Alm's protests, there can be no doubt that the Texas Supreme Court in fact shifted to and applied a different theory of liability to affirm the award of punitive damages. The procedural history in the courts below, which respondent glosses over, speaks for itself:

*It is undisputed that the trial court considered "all the circumstances" in reviewing the jury's finding of gross negligence and held that finding to be "against the great weight and overwhelming preponderance of the evidence." Pet. 5. (A81).[5]

*It is undisputed that the Court of Appeals likewise evaluated the finding of punitive liability by "weigh[ing] all the evidence, both in support of and contrary to the challenged finding" (A22), and threw the verdict out because it was "so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." (A22-23). Pet. 6.

*Finally, it is indisputable that the Texas Supreme Court, bound by that court of appeals determination under the Texas Constitution,[6] chose to disregard Alcoa's warnings to the

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[5] Despite this undeniable procedural event, Alm insists that this case was not in fact tried under the "all the circumstances" standard because the jury charge did not contain that precise "phrase." Resp.Br. 20 n.39. But jury instructions are not mystical incantations that must never vary in form. What respondent overlooks are the facts (1) that the court's jury instructions defining the "preponderance of the evidence" made plain that *all* credible evidence was to be considered, and (2) that Jury Question 11 defined gross negligence as an "entire want of care" (A79) — a standard long deemed synonymous with an evaluation of "all the surrounding circumstances." *See Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 916, 917, 919, 920 (Tex. 1981) (citing cases); Pet. 2-3.

[6] Respondent's oblique rejoinder notwithstanding, Resp.Br. 11 n. 23, the Texas Constitution could not be clearer on this issue. The Texas Supreme Court has held, without dissent on the matter, that "[c]ourts of appeals have conclusive jurisdiction of fact questions on appeal under Tex.Const. art.V.,

Seven-Up Company and other bottlers, decided to examine only plaintiff's evidence, and thereupon ruled that Alcoa had been grossly negligent *as a matter of law*.

Indeed, the Texas Supreme Court took these steps at the behest of respondent Alm, who criticized the previously prevailing "entire want of care" standard and vigorously urged the state's highest court to redefine gross negligence so as to disregard Alcoa's warnings to the soft drink industry. *See* Alm's Amended Application for a Writ of Error in the Texas Supreme Court at 21-27. Since respondent has previously admitted that he petitioned the Texas Supreme Court to "change[ ] Texas gross negligence law," Alm's Answer to Motion for Rehearing in the Texas Supreme Court at 22, fervent denials that such a change indeed took place do not sit very well in respondent's mouth. *See also id.* ("It is true that plaintiff had requested that the Court extend *Burk Royalty*.").

Petitioner is aggrieved not, as respondent supposes, Resp.Br. 21, by the Texas Supreme Court's mere application of state law to the facts in this case, but by its affirmance of punitive liability on appeal under a theory demonstrably different from that which was applied at trial. The conclusion that a different standard was in fact applied is inescapable. Since

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§6." *Herbert* v. *Herbert*, 754 S.W.2d 141, 143 (Tex. 1988). It is universally recognized that this amendment to the state constitution "was designed to remove fact jurisdiction from the supreme court and place it in the newly created courts of (civil) appeals." *Id.* The Texas Supreme Court is empowered to reverse a court of appeal's ruling on the facts only if the lower court "utilizes an incorrect test in reviewing factual insufficiency," *id.* at 144, by, for example, substituting its own appraisal of the facts rather than merely determining whether the verdict is contrary to "the *great* weight of the evidence," *id.* (original emphasis). This is what happened in the case on which respondent mistakenly relies. *See Sterner* v. *Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989), *cited in* Resp.Br. 11 n.23. The Texas Supreme Court there remanded to the court of appeals and directed application of the correct standard — which is the same standard properly applied by the court of appeals in this case: whether the jury's finding was "against the great weight and preponderance of the evidence." *Sterner*, 767 S.W.2d at 691. In *Sterner* the court of appeals had erred because it "considered only that evidence and the reasonable inferences therefrom tending to support the jury's 'finding,' and disregarded all contrary evidence . . . . This review, alone, cannot be the basis for establishing an issue as a matter of law." *Id.* at 690.

the Texas Supreme Court is required by the state's own constitution to defer to the court of appeal's review of the *facts*, the high court's only possible avenue for reversing the lower court was to insist upon a different standard of *law*: the Texas Supreme Court could reinstate the jury's punitive judgment *only* by applying a standard of liability that, unlike the court of appeal's standard, did *not* take all circumstances into account and that looked almost exclusively to the plaintiff's case.

Indeed, even under respondent's theory of the Texas Constitution, the Texas Supreme Court may reverse a factual determination of the court of appeals and reinstate a jury award only if that award is "supported by *all* of the evidence." Resp.Br. 11 n.23 (emphasis added). Obviously, since the court of appeals had conclusively ruled that the imposition of punitive damages against Alcoa was contrary to the "great weight and preponderance of the evidence," Texas' highest court could hold that the jury's damage award was supported by "all" the evidence *only* if it shifted to a different theory of punitive liability, one that did not require consideration of all the circumstances and that therefore summarily disregarded the core of defendant's case — the warnings to Seven-Up and other soft drink companies. Respondent protests, but fails to explain how any other conclusion is logically possible.[7]

In *Cole* v. *Arkansas*, this Court granted a writ of certiorari to a state supreme court and unanimously reversed a judgment

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[7] Respondent can find no comfort in the assertion that the Texas Supreme Court itself purported to be applying the same "all the circumstances" standard of liability, and did not *formally announce* that it was applying a different standard on appeal. *See* Resp.Br. 20. For whether court-ordered punishment has been affirmed on appeal on a theory different from that used to impose it at trial is necessarily a *federal* question to be decided by this Court in the course of its due process analysis, as it was in *Cole* v. *Arkansas* and its progeny. Alm's argument that this makes a federal case of "any new state court decision regarding tort law," Resp.Br. 22, obviously proves far too much, since it would apply to the unanimous decision in *Cole* as well as the more contemporary decisions in which *Cole* has been reaffirmed by this Court. *See* Pet. 13-14. There is nothing preposterous or dangerous in the well established principle that punishment may not be affirmed on appeal on a basis different from that on which it was initially imposed at trial.

imposing punishment because "petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." 333 U.S. at 202. The same action is called for here.

3. The third question presented by Alcoa's petition is whether the *ex post facto* principle of the Fourteenth Amendment's Due Process Clause prevents a state supreme court, in the course of policing discretionary jury awards of punitive damages, from lowering the threshold for imposing punitive damages and applying this new standard retroactively to acts that were governed, at the time they took place, by a standard more generous to defendants. Respondent Alm strains to rebut what this Court has *already* recognized: that retrospective imposition of punitive damages under a new standard of liability is an "important issue[ ] which, in an appropriate setting, must be resolved." *Aetna* v. *Lavoie*, 475 U.S. at 828. *See* Pet. 21.

Respondent voices no significant disagreement with petitioner's substantive argument on *ex post facto* principles and once again offers only the contention that there has in fact been no real change in the standard for evaluating gross negligence and imposing punitive liability.[8] That position crumbles in the face of a fact that no member of the Texas Supreme Court has denied: *finding a defendant grossly negligent and imposing punitive damages as a matter of law is wholly unprecedented*. (A7-8, A12). In a dramatic departure from the law that governed Alcoa's conduct at the time in question — the "all the surrounding circumstances" standard that Alm concedes to have been the governing theory of liability, Resp.Br. 20 — the court below, at Alm's request, simply disregarded

[8] Contrary to respondent's misapprehension, Resp.Br. 18, the *Ex Post Facto* Clause itself is not implicated in this case since that clause, of course, directly applies to legislative rather than judicial decrees. In any event, Alm's grasp of *ex post facto* principles, *see* Resp.Br. 18 n.36, is roughly 40 years out of date, since Alm ignores this Court's decisions in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), *Marks* v. *United States*, 430 U.S. 188 (1977), and, most recently, *Collins* v. *Youngblood*, 58 U.S.L.W. 4855, 4858 (U.S. June 21, 1990) (citing L. Tribe, *American Constitutional Law* 638 (2d ed. 1988)).

Alcoa's detailed warnings to Seven-Up and held that the jury could not, as a matter of law, disbelieve the plaintiff's case.[9]

Alcoa's claim is not, as Alm suggests, Resp.Br. 20, some sort of evidentiary argument that Alcoa's warnings to soft drink companies absolutely, necessarily, or even presumptively preclude a verdict of gross negligence. Rather, Alcoa contends only that such warnings and other "surrounding circumstances" may not be summarily disregarded *ex post facto* by an appellate court when the law deemed them relevant to the issue of gross negligence at the time of the conduct in question. A remand for a new trial on punitive liability — which the court of appeals had ordered — is all that is at stake here and all that Alcoa seeks.

At that new trial, the jury can properly evaluate the evidence and theories of liability that Alm and the Texas Supreme Court now embrace, which differ dramatically from those that were pressed at trial. For example, Alm reveals great enthusiasm in his latest brief for the theory that Alcoa was grossly negligent because it could have required J.F.W., the bottler, to put a warning label on the Seven-Up bottle by making the placement of such a label a condition for obtaining a license to use Alcoa's capping machine. Resp.Br. 6-7 & n.12, 12 n.25. Yet it is undisputed that, as the court of appeals noted, Alm *previously* "appear[ed] to agree that . . . neither Alcoa, J.F.W., or anyone else, other than Seven-Up, could control what appeared on the bottles." (A26). Indeed, before the Texas Supreme Court

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[9] While refusing to specify what standard of liability he thinks governed Alcoa's conduct in 1976 when the acts at issue took place (as opposed to the standard he believes was applied at trial), Alm states that the standard *could not* have been the "all the circumstances" test because that did not become law until *Burk Royalty* was decided in 1981. Resp.Br. 20 n.39, citing Pet. 11. Respondent is obviously mistaken. The passage from *Burk Royalty* quoted in Alcoa's petition at 11, to which Alm refers, itself quoted and described a *1975* decision employing the same standard. *See Burk Royalty*, 616 S.W.2d at 921 (describing *Atlas Chemical Industries, Inc.* v. *Anderson*, 524 S.W.2d 681 (Tex. 1975)). In *reaffirming* that punitive damages may be imposed only upon a finding of "an entire want of care, looking to all of the surrounding facts and circumstances, not just individual elements or facts," *id.* at 919, *Burk Royalty* relied on cases decided as early as 1952. *Id.*

shifted to a different theory of liability, "Alm argued that Seven-Up controlled warning labels, and Alm vigorously argued to [the court of appeals] that Alcoa could not satisfy its duty to warn Alm by warning J.F.W., *because Alcoa had a duty to warn Seven-Up*." (A30) (original emphasis).

Given Alm's own previous position, it is disingenuous, to say the least, for Alm now to argue that Alcoa was not prejudiced when the Texas Supreme Court, at Alm's urging, changed the rules in mid-appeal, summarily disregarded Alcoa's warnings to Seven-Up, and imposed punitive damages as a matter of law. Neither the Texas Supreme Court nor the respondent has ever disagreed with the court of appeal's conclusion that "the evidence on the issue of gross negligence was not well developed in light of the Supreme Court's new rule." (A26).

We are dealing here with punishment — punitive damages — *not* with a mere compensatory judgment. The court of appeals ruled that it would be "manifestly unjust" to sustain a punitive award without giving Alcoa a new trial (A26), and the decision of the majority below to affirm the award on a different theory of liability without a new trial bitterly divided the Texas Supreme Court. Rather than trying to refute the dissent's analysis (which the majority below likewise declined to address), respondent brushes it off as the characteristically "flamboyant" rhetoric of a single jurist. Resp.Br. 12 n.27. Even if such *ad hominem* arguments were appropriate, Alm overlooks two things: first, three other justices joined that dissent; second, and more importantly, the majority itself *never denied* that disregarding Alcoa's warnings to Seven-Up (among others) and imposing punitive damages as a matter of law, on the basis of plaintiff's proof alone, represented an unprecendented shift in the governing legal standard. The Due Process Clause accordingly requires that Alcoa be granted a new trial.

CONCLUSION

Whatever due process limits on jury awards of punitive damages this Court may deem mandatory in *Pacific Mutual* v. *Haslip* will mean little indeed if the state appellate courts charged with applying and policing those limits (once the states formulate their details) are free to rewrite the rules after the trial and after the fact — as the court below did here. This Court should therefore grant a writ of certiorari and set this case for argument, or at the very least hold this case for resolution pending a decision in *Pacific Mutual*.

Respectfully submitted,

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